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No. 91-2036

In the Supreme Court of the United States

OCTOBER TERM, 1992

DAVID L. WHALEN, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE OFFICE OF PERSONNEL MANAGEMENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the fact that petitioner was an "employee" under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, while attending the United States Merchant Marine Academy, require the Office of Personnel Management (OPM) to find that he was also an "employee" for purposes of the Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.*, and thus eligible for civil service retirement credit.

2. Whether, in the absence of a statutory definition of the term "employee" in the Civil Service Retirement Act prior to 1966, OPM's interpretation of that term is valid.

3. Whether petitioner's appointment to the United States Merchant Marine Academy was an appointment in the Civil Service within the meaning of 5 U.S.C. 2105.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 959 F.2d 924. The initial decision of the Merit Systems Protection Board (Pet. App. B5-B24) is unreported. The order of the Merit Systems Protection Board (Pet. App. B1-B4) denying petitioner's petition for review of the initial decision is unpublished, but the decision is noted at 48 M.S.P.B. 450 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1992. A petition for rehearing was denied

on April 15, 1992. The petition for a writ of certiorari was filed on June 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was enrolled as a cadet-midshipman in the United States Merchant Marine Academy (USMMA) from 1954 to 1958. In 1990, in an attempt to receive civil service retirement credit for the period during which he attended the USMMA, petitioner applied to the Office of Personnel Management (OPM) to make a deposit into the Civil Service Retirement System (CSRS) to cover his four-year USMMA enrollment. Pet. App. A6-A7, B5.

On March 7, 1990, OPM denied petitioner's request, stating that petitioner was not a federal "employee" within the meaning of the CSRS while at the USMMA, and that his enrollment was therefore not creditable under the CSRS. Petitioner requested that OPM reconsider its decision, and on October 15, 1990, OPM issued its decision on reconsideration reaffirming the denial of petitioner's claim. OPM explained that: (1) petitioner did not meet the statutory definition of "employee" contained in 5 U.S.C. 2105; (2) the Civil Service Commission (CSC) had issued a decision on May 19, 1947, in which it stated that enrollment as a cadet-midshipman at the USMMA did not constitute employment with the Federal Government; and (3) while the Merit Systems Protection Board (MSPB) had once ruled that attendance at one of the United States military academic institutions was creditable as military service pursuant to the CSRA, see *Jeffrey* v. *OPM*, 28 M.S.P.B. 81 (1985), that ruling had been reversed by the court of appeals. *Horner* v. *Jeffrey*, 823 F.2d 1521 (Fed. Cir. 1987) (en banc).

2. Petitioner appealed OPM's decision to the MSPB's Atlanta regional office. Petitioner asserted that his attendance at the USMMA should be credited for civil service retirement purposes for a number of reasons. Petitioner maintained that: (1) he met the definition of a government "employee" in the Federal Employees Compensation Act (FECA), 5 U.S.C. 790 (1952) (presently codified at 5 U.S.C. 8101); (2) while at the USMMA, he performed functions equivalent to that of an "administrative enrollee," and thus was eligible for retirement credit for his service, pursuant to former 46 U.S.C. 1126(f)(4) (1964), repealed, Pub. L. No. 96-453, § 3(d), 94 Stat. 2009;[1] (3) his USMMA service was comparable to that of students enrolled in cooperative education programs who received civil service retirement credit for their enrollment; and (4) he satisfied the definition of "employee" in 5 U.S.C. 2105 while at the USMMA.[2]

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[1] 46 U.S.C. 1126(f)(4) (1976) provided:

> On such date as may be fixed by the Civil Service Commission * * * persons then serving as administrative enrollees shall be brought into the competitive civil service or excepted civil service in accordance with the Civil Service Act and rules, and shall thereafter be compensated * * * subject to the following exceptions and conditions:
>
> (4) Active service of any administrative enrollee performed prior to the date specified in the first sentence of this subsection (f) shall be considered creditable as civilian employment in the executive branch of the Federal Government for all purposes * * *.

[2] 5 U.S.C. 2105 provides in pertinent part:

> (a) For the purpose of this title, "employee" * * * means an officer and an individual who is—
>
> (1) appointed in the civil service by one of the following acting in an official capacity—
>
> * * *

On February 28, 1991, the MSPB affirmed OPM's decision. Pet. App. B5-B24. The MSPB analogized petitioner's enrollment in the USMMA to attendance at one of the United States military institutions, which under 10 U.S.C. 971(b)(1) is not creditable for purposes of the CSRS.[3] Pet. App. B7-B10. The legislative history of that statute establishes that Congress did not intend to permit service at a military academy to be credited towards civil service retirement benefits, because the military academies offered individuals an education provided at government expense. The MSPB ruled that the same reasoning should apply to attendance at the USMMA. Pet. App. B10.

The MSPB similarly rejected petitioner's other arguments. The board held that FECA did not define

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> (D) an individual who is an employee under this section
>
> * * *
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

[3] 10 U.S.C. 971(b)(1) provides that

> In computing length of service for any purpose * * * no officer of the Navy or Marine Corps may be credited with service as a midshipman at the United States Naval Academy or as a cadet at the United States Military Academy, United States Air Force Academy, or United States Coast Guard Academy.

Section 971(b)(2) and (3) similarly specify that no commissioned officer of the Army, Air Force, or Coast Guard may be credited for time in attendance at one of the military institutions.

"employee" for purposes of the CSRS (Pet. App. B10-B12), and that petitioner's service at USMMA was comparable neither to that of an administrative enrollee (Pet. App. B12-B15), nor to that of a student participating in a cooperative program (Pet. App. B19-B20). Moreover, the board found that petitioner had not satisfied the definition of "employee" in 5 U.S.C. 2105 while at USMMA, because there was no indication that he had been appointed into the civil service. Pet. App. B15-B17. The full MSPB denied petitioner's petition for review, finding that it did not meet the MSPB's criteria for review set forth at 5 C.F.R. 1201.115. Pet. App. B1-B4.

3. The United States Court of Appeals for the Federal Circuit affirmed. Pet. App. A1-A25. The court of appeals found that, because the USMMA is a civilian, rather than military, institution, the MSPB's comparison of the USMMA to the military academies was misplaced. Pet. App. A7-A10. The appellate court, however, agreed that petitioner was not an "employee" within the meaning of 5 U.S.C. 2105 while enrolled at the USMMA, and as a result could not receive CSRS credit for that time. Pet. App. A19-A23. The court stated that the definition of "employee" in FECA was not applicable to a determination of whether an individual was an "employee" for CSRS purposes. Pet. App. A13-A15.

The court of appeals rejected petitioner's argument that, because 5 U.S.C. 2105 was not enacted until 1966, it could not be used to determine whether petitioner was an employee from 1954-1958. Pet. App. A14. The court held that Section 2105 "made no change in the substantive requirements of status as an 'employee' for retirement purposes," Pet. App. A14, and that petitioner had not been an "employee" under Section 2105 while at USMMA because he had

not been "appointed in the civil service" as required by that provision. Pet. App. A22.

Finally, the court concluded that petitioner was not an "administrative enrollee" entitled to CSRS credit pursuant to 46 U.S.C. 1126(f)(4) (1976) (Pet. App. A15-A19), that there was no basis for extending benefits given to administrative enrollees to cadet-midshipmen (Pet. App. A18-A19), that any statements in the Federal Personnel Manual indicating that civil service retirement credit should be given for attendance at military academies were contrary to 10 U.S.C. 971 and thus could not be relied upon by petitioner (Pet. App. A23-A24), and that petitioner's enrollment at the USMMA was not similar to that of students in cooperative education programs who had been specifically appointed into the civil service and whose service was creditable under the CSRS (Pet. App. A25).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Therefore, further review is not warranted.

1. Petitioner contends that the definition of "employee" in the FECA, 5 U.S.C. 790(b)(4) (1952) (presently codified at 5 U.S.C. 8101), which included USMMA cadet-midshipmen during the time petitioner attended the USMMA, should govern in this case. Petitioner's claim rests upon the fact that, prior to 1966 and the enactment of 5 U.S.C. 2105, there was no statutory definition of "employee" for purposes of civil service benefit eligibility. Pet. 16-20.

Petitioner's contention is mistaken. FECA's definition of a cadet-midshipman as an "employee" eligible for workers' compensation benefits does not determine whether petitioner is an employee for

purposes of receiving civil service retirement credit. FECA and the CSRA represent two distinct statutory schemes that serve entirely different purposes. *Johnson* v. *Merit Systems Protection Board*, 812 F.2d 705, 707-709 (Fed. Cir. 1987). FECA benefits extend to a wide range of individuals who are not "employees" eligible for civil service retirement benefits as defined by 5 U.S.C. 2105,[4] and the plain language of FECA makes clear that its definition of "employee" is provided only "[f]or the purpose of *this* subchapter." 5 U.S.C. 8101 (emphasis added). In short, as the court of appeals found, the definition of "employee" under FECA is simply inapposite to a determination of whether an individual is an "employee" for purposes of the CSRS. Cf. *Costner* v. *United States*, 665 F.2d 1016, 1022 (Ct. Cl. 1981) (definition of "employee" pursuant to Fair Labor Standards Act not controlling in claim for annuity under the CSRA).

Petitioner's reliance (Pet. 19) on *Horner* v. *Jeffrey* is misplaced. In *Jeffrey*, the Federal Circuit ruled that a provision of the Federal Personnel Manual which gave civil service retirement credit for attendance at the nation's military academies was inconsistent with an existing statute. The court therefore held that, despite the fact OPM had been following the personnel manual provision for 40 years, that provision was invalid. *Jeffrey*, 823 F.2d at 1529-1530. In this case, by contrast, OPM's longstanding practice of refusing to give retirement credit for attendance at USMMA is not inconsistent with any statute or other source of law. Accordingly, that practice, which was validated for terms of employment

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[4] For example, FECA covers injuries sustained by individuals working in the logging and timber industries on the Menominee Indian Reservation in Wisconsin. 5 U.S.C. 8101(1)(c).

beginning in 1966 by Congress's enactment of 5 U.S.C. 2105(a), should be given full effect.[5]

2. Petitioner contends that he satisfied the requirements of 5 U.S.C. 2105 while attending the USMMA. He states that the court of appeals accepted that he had been appointed to "something" (Pet. 24) by a federal official, and that, since it is conceded that his appointment was not to the military, it must have been to the civil service.[6] Pet. 23-25.

Petitioner's argument does not take account of the fact that a federal official can confer a benefit or a status on an individual without appointing him either to the military or to the civil service. The Federal Circuit has explained that there must be a "significant degree of formality in the appointment process" to satisfy the requirements of Section 2105.

[5] The legislative history of the 1966 statute makes clear that Congress did not intend to make any changes in the substantive requirements which were already being used to determine CSRS eligibility. See H.R. Rep. No. 901, 89th Cong., 1st Sess. 3, 17 (1965); S. Rep. No. 1380, 89th Cong, 2d Sess. 47 (1966). Thus, the court of claims and the Federal Circuit have held that the definition of "employee" in 5 U.S.C. 2105 can be applied when making a determination whether an individual was an employee prior to the enactment of Section 2105 in 1966. See *Costner*, 665 F.2d at 1019 n.14; *Watts* v. *OPM*, 814 F.2d 1576, 1580 (Fed. Cir. 1987). See also *Stapleton* v. *Macy*, 304 F.2d 954, 955 n.3 (D.C. Cir. 1962); *Curran* v. *Office of Personnel Management*, 566 F.Supp. 1511 (D.D.C. 1983), aff'd, 735 F.2d 617 (D.C. Cir. 1984) (Section 2105 applied to pre-1966 service).

[6] Petitioner also states (Pet. 23) that the court of appeals found that he had satisfied "all of the tests of employee status under 5 U.S.C. 2105(a) except that the Petitioner was not appointed to the Civil Service." That statement is mistaken. The court of appeals merely restated petitioner's assertions that he had satisfied all three requirements of Section 2105 and then held that petitioner had not established that he had been appointed in the Civil Service in accordance with 5 U.S.C. 2105(a)(1). Pet. App. A20-A22.

Horner v. *Acosta*, 803 F.2d 687, 692 (Fed. Cir. 1986). The court has also noted with approval the MSPB's statement that, "at the very least, an intentional, unequivocal exercise of discretion by an appointing official to appoint an individual to a particular position" is necessary. *Acosta*, 803 F.2d at 692. Because "an appointment [to the civil service] requires formality and process that did not occur here" (Pet. App. A22), petitioner's appointment to the USMMA was not an appointment to the civil service.

Jankovic v. *United States*, 384 F.Supp. 1355 (D.D.C. 1974), does not support petitioner's argument. In *Jankovic*, the district court held that a Department of State contract employee was a government employee. The court reached that result in order to avoid creating the fiction that the contract employee had not been employed by anyone. Even if *Jankovic* had been rightly decided, petitioner was not an employee of the government, contract or otherwise, while at USMMA, and the reasoning of *Jankovic* accordingly would not apply here. In any event, however, the Federal Circuit and the Court of Claims have disapproved a broad reading of *Jankovic* as inconsistent with the language of Section 2105. *Acosta*, 803 F.2d at 694 n.11; *Costner*, 665 F.2d at 1021 n.20 ("[t]o the extent, however, that *Jankovic* can be read as not insisting on the appointment requirement, we decline to follow it").

3. Petitioner finally contends (Pet. 26) that his attendance at the USMMA was equivalent to the service of an "administrative enrollee," a category of individuals who, though lacking in formal appointments into the Civil Service, were subsequently given civil service retirement credit for the time they

worked at the USMMA by statute.[7] Petitioner did not enter the USMMA as an "administrative enrollee," but rather as a cadet-midshipman. Furthermore, although Congress passed legislation granting administrative enrollees civil service retirement credit for USMMA service, Congress did not grant—and there is no indication that Congress intended to grant—similar civil service retirement benefits to cadet-midshipmen such as petitioner. Cf. *Watts* v. *OPM*, 814 F.2d at 1579 ("Congress clearly did not intend to award retirement benefits to all persons who might be thought to deserve them. It can, itself, add to the entitlements it has created when it deems it right to do so.").

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[7] In 1961, Congress amended the Merchant Marine Act of 1936, 46 U.S.C. 1126, to clarify the status of certain staff members at the USMMA. Subsection (f)(4) of the statute granted retroactive civil service employment to administrative enrollees. Administrative enrollees were defined in an opinion of the United States Attorney General as those individuals "enrolled for permanent, or at least indefinite, employment with the Maritime Service, [and who] do not ordinarily receive training to fit them for service on merchant vessels * * *. These men constitute in large part the administrative staff of the Maritime Service." 41 Op. Att'y Gen. 115, 116-117 (1952). 46 U.S.C. 1126(f)(4) was repealed in the Maritime Education and Training Act of 1980, Pub. L. No. 96-453, § 3(d), 94 Stat. 2009. Petitioner was not an administrative enrollee because he was enrolled at the USMMA for a definite period and was required to serve on a merchant vessel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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